FEDERAL ELECTION COMMISSION
Washington, DC 20463

CONCURRING OPINION IN ADVISORY OPINION 1983-13

of

COMMISSIONER FRANK P. REICHE

While I concur with the result reached by the Commission in Advisory Opinion 1983-13, I do not agree with much of the reasoning advanced as justification therefor and believe that the potential precedential effect of this decision should be limited to the particular facts of this case.

By its Opinion, the Commission has sanctioned not only the contribution of funds to a political campaign by a decedent's estate, but also contributions in such amounts as would normally exceed the limits contained in Section 441(a) of the Federal Election Campaign Act. Although I do not see any impediment in the Act to the making of political contributions by a decedent's estate, there is no basis in law or in fact for the conclusion that contributions in excess of the limits contained in Section 441(a) may be made as long as the amount actually received by a separate segregated fund does not exceed the prescribed $5,000.00 limit in any calendar year. While I am perfectly willing to interpret the Act so as to permit the making of a political contribution by a decedent during the year of his or her death, I see no basis whatever for concluding that some higher limit should apply to such contributions as opposed to contributions made by an individual or by some other "person" under the Act. The mere fact that the recipient of such contributions promises not to siphon off more than $5,000.00 in any calendar year does not mean that the value of this irrevocable gift did not exceed $5,000.00 at the time of transfer. One need but examine Internal Revenue Service rules governing the valuation of gifts in order to recognize that a gift of this magnitude, namely, $20,500.00, does indeed constitute a gift having a present value in excess of $5,000.00 at the time of the gift, even though the total value of such gift must naturally be discounted somewhat to reflect the fact that the recipient will not receive the entire amount during the year of transfer.

The Advisory Opinion states unequivocally that the testator, could have established a testamentary trust (rather than make a specific bequest by Will) directing the Trustee to make annual distributions" to the separate segregated fund of $5,000.00 or less, but does not cite any authority for such assertion. I would suggest that there is no

authority which would sanction the establishment of a testamentary trust for this purpose, particularly when such a trust has a present value in excess of $5,000.00.

The Advisory Opinion very properly limits its application to testamentary political contributions, thus excluding from its purview gifts made by inter-vivos transfer. Where the contributor is still living, as might be the case with respect to such inter-vivos contributions, and where the identity of the recipient is not specified as it is here, the possibility of the contributor influencing the selection of recipients and the magnitude of such gifts would be increased, thereby heightening the possibility that the law might thereby be circumvented, particularly if the contributor continued to make political contributions in his or her own name.

What is most disturbing is the possibility that political candidates and committees might attempt to solicit contributions from such sources having a present value far in excess of the limit prescribed by Section 441(a). In addition, there is the very real risk that deceased persons, or fiduciaries with relatively little knowledge of their intentions acting on their behalf, might play a significant role in future political campaigns. I do not believe it is in the best interest of this country, nor do I believe that Congress intended, to encourage the active participation of individuals in the political process beyond the limits specified in Section 441(a) and particularly after these individuals have died. The potential for solicitation of bequests and other forms of testamentary gifts is frightening in terms of permitting those who no longer have the capacity for analyzing political issues and candidates to have a meaningful voice in the process. The prospects are even more frightening if one were to contemplate sanctioning the making of irrevocable inter-vivos gifts having a present value in excess of the Section 441(a) limits.

Thus, I do not agree with the rationale advanced by our counsel in this Opinion. I do, however, agree with the result, given facts of this case. If, for example, we were to hold that the amount contributed to the National Maritime Union's separate segregated fund in excess of $5,000.00 had to be returned to the decedent's estate, the estate would be faced with a difficult, and perhaps insoluble problem. Not only was it settled some time ago, but the decedent's 1974 Will, which was admitted to probate did not Provide an alternative beneficiary of his residuary estate. In view of the fact that the separate segregated fund has agreed not to use more than $5,000.00 per year from this escrow account, and also considering the fact that the total amount of the bequest was only slightly in excess of $20,000.00, 1 do not think that the system will be greatly harmed by permitting the administration of this bequest as contemplated by the separate segregated fund.